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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

ROBERT CLIFFORD VALLEY, Petitioner.

vs.

ROSALIE GAIL VALLEY, Respondent,

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF OREGON

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the special Oregon statute which authorized the modification of prior final dissolution decrees to permit a division of military pensions violates the Oregon and United States Constitutions' prohibition of the passage of laws impairing the obligations of contract?

2. Whether the Oregon Court of Appeals' decision under this special statute which ordered a retroactive division of Petitioner's military pension benefits already received by him violates 10 U.S.C. § 1401 *et. seq.* and U.S. Const., art. VI, § 2?

3. Whether the U.S. Congress had any intention of making the Uniformed Services Former Spouses Protection Act (10 U.S.C. § 1401 *et. seq.*) retroactive?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

ROBERT CLIFFORD VALLEY, Petitioner.

vs.

ROSALIE GAIL VALLEY, Respondent,

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF OREGON

The Petitioner Robert Clifford Valley respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of Oregon, entered in the above-entitled proceeding on November 8, 1989.

OPINIONS BELOW

1. On June 14, 1989, the Oregon Court of Appeals issued an opinion (reversing the trial court) which modified the property

division of an 1982 dissolution decree, and awarded Respondent 47% of Petitioner's military pension. (Appendix 5 at App-8.)

2. On November 8, 1989, the Oregon Court of Appeals modified its earlier opinion, and ordered that the award of the Petitioner's military pension (which he had been receiving since 1982) be effective on February 8, 1988 (the date the Respondent first petitioned the trial court for this relief). (Appendix 6 at App-12.)

3. On February 9, 1990, the Court of Appeals issued an order denying reconsideration. (Appendix 7 at App-14.)

4. On March 27, 1990, the Oregon Supreme Court issued an order denying review. (Appendix 8 at App-15.)

5. On May 22, 1990, the Oregon Supreme Court issued an order denying reconsideration. (Appendix 9 at App-16.)

JURISDICTION

The judgment of the Oregon Court of Appeals sought to be reviewed was entered November 8, 1989. A Petition for Review/Reconsideration was filed in the Oregon appellate courts on January 17, 1990. The Oregon Court of Appeals denied that motion for reconsideration on February 9, 1990. The Oregon Supreme Court denied review on that petition on March 27, 1990.

A Petition for Reconsideration was filed in the Oregon Supreme Court on April 24, 1990. The Oregon Supreme Court denied that petition on May 22, 1990. Jurisdiction for this Petition for Writ of Certiorari is conferred on this Court by 28 U.S.C. § 1257(a) (1988).

STATUTES INVOLVED

The following statutes, rules and orders involved in this appeal are reproduced in the Appendix at the pages

noted.

U.S. Const., art. VI, § 2 . . . . App-1

Oregon Laws 1987, chapter 188, § 1. App-1

10 U.S.C. § 1408(c) (1987) . . . App-2

10 U.S.C. § 1408(d) (1987) . . . App-4

STATEMENT OF THE CASE

Six years after an original dissolution of marriage judgment, the Respondent wife sought to have it modified pursuant to Oregon Laws 1987, chapter 188[1], to include a division of Petitioner's Coast Guard pension. This Oregon statute was enacted in 1987 following the enactment by Congress of the Uniformed Services Former Spouses Protection Act (10 U.S.C. § 1401 et. seq.). The Respondent in this case could not avail herself of the terms of the federal act because the dissolution of her marriage to

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[1] See Appendix 1 for full text of this Oregon statute.

the Petitioner had already become final when the federal legislation became effective on February 1, 1983.[2]

The trial court denied her petition, after viewing all of the circumstances of the parties, both at the time of the dissolution in 1982, and at the present. At the time of the dissolution, the Respondent did not request that she be awarded any spousal support. The Petitioner had been receiving his pension from the Coast Guard monthly, in amount of $1197 per month before taxes, before the dissolution proceeding.

In the dissolution proceeding the Respondent received the **vast bulk** of the parties' assets, in the neighborhood of

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[2] This federal legislation was designed to overturn the decision by this Court in *McCarty v. McCarty*, 453 U.S. 210 (1981) which held that state courts were prohibited by federal law from dividing military pensions in a marriage dissolution proceeding.

$8,000, and the Petitioner assumed all of the parties' debts. The Respondent's testimony at the modification hearing was that the income she received from her employment more than covered her needs. The trial court viewed all of the parties' rights, obligations, circumstances, and equities, both then and at the time of the previous dissolution proceedings, and concluded that it would not be equitable to award the Respondent a portion of the Petitioner's pension.

The Respondent wife appealed to the Court of Appeals of the State of Oregon. In its opinion issued June 14, 1989, the appellate court reversed the trial court and awarded the Respondent 47 percent of the Petitioner's Coast Guard pension. The Petitioner filed a joint Petition for Review and Reconsideration, and on reconsideration the Oregon Court of Appeals

issued an opinion November 8, 1989, which modified the earlier opinion to make it effective on February 8, 1988, the date on which the Respondent originally filed her petition in the trial court.

The Petitioner then filed another Petition for Review/Reconsideration, arguing that the retroactive application of the award of pension benefits violated federal law. On this second petition the Oregon Court of Appeals denied reconsideration, and the Oregon Supreme Court denied review. The Oregon Supreme Court later denied Petitioner's subsequently filed Petition for Reconsideration.

REASONS FOR GRANTING THE WRIT

I. Introduction.

In the first Petition for Review the Petitioner requested that if the Court of Appeals did reverse its previous ruling, that it should order that the Qualified

Domestic Relations Order not take effect until after January of 1990, to give the Petitioner time to adjust to this severe change in his monthly income. This was particularly necessary since he testified that he would have to sell his home because he would no longer be able to afford the monthly payments. Tr. 52-53.

On reconsideration the Court of Appeals instead ordered that the decision take effect February 8, 1988, the date the wife first filed her motion.

This was in effect a property division which divided property which no longer existed. As such it was not only completely unfair, but completely contrary to the laws of property division. It will require the Petitioner to sell his home and much of his assets to pay the resultant judgment for $13,705 for these two years' back benefits. The decision further ignored the

fact that the Petitioner has paid the federal and state income taxes on these benefits.

II. The decision is contrary to federal law.

This decision is contrary to the federal law which enabled the passage of the special state statute involved here. 10 U.S.C. § 1408(d)(1) provides in part that

> "After effective service on the Secretary concerned of a court order providing * * * with respect to a division of property, specifically providing for the payment of an amount of the disposable retired or retainer pay from a member to the spouse or a former spouse of the member, the Secretary shall make payments (subject to the limitations of this section) from the disposable retired or retainer pay of the member to the spouse or former spouse * * *."[3]

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[3] Disposable income is that amount payable after taxes and other legal deductions have been made. 10 U.S.C. § 1408(a)(4)

The federal statute provides that such payments shall ordinarily begin "not later than 90 days after the date of effective service" of this court's order on the appropriate Secretary. 10 U.S.C. § 1408(d)(1). Also, the Oregon statute provides that any modification ordered pursuant to it shall be "in a manner consistent with federal law."[4]

Furthermore, this decision represents a drastic departure from Oregon statute and case law regarding the division of marital property. That law provides that the trial court has the power to divide the marital assets of the parties, that is, those assets of the parties which are in existence at the time of the dissolution judg-

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[4] Oregon Laws 1987, chapter 188, section 1(1). (Appendix 2.)

ment. ORS 107.105(1)(f)[5]. This is underscored by the Oregon statute which provides that while a dissolution action is pending, the trial court may issue a temporary order forbidding the parties from disposing of any of their assets. ORS 107.095(1)(e)[6]. When the wife filed her petition in February 1988 to receive a portion of the husband's pension, she did not request that the court order the husband not to dispose

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[5] "(1) Whenever the court grants a decree of marital annulment, dissolution or separation, it has power further to decree as follows:
* * * * *
"(f) For the division or other disposition between the parties of the real or personal property, or both, of either or both of the parties as may be just and proper in all the circumstances. * * *"

[6] "(1) After the commencement of a suit for marital annulment, dissolution or separation and until a decree therein, the court may provide as follows:
* * * * *
"(e) Restraining and enjoining either party or both from encumbering or disposing of any of their property, real or personal, except as ordered by the court."

of any of this asset while the action was pending. During this time he was receiving his pension "asset" in the form of monthly payments which he was using for regular living expenses.

Thus the Court of Appeals decision departs from both federal and Oregon law by requiring that the husband compensate the wife for in excess of $13,000 of pension benefits received by him prior to the Court of Appeals decision, which "assets" are no longer in existence, having been spent by the husband in his normal course of living.[7] Further, the husband already paid in excess of $4,000 in state and federal taxes

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[7] Since the appellate judgment has yet to issue from the Oregon Court of Appeals in this case, it has yet to become effective. Additional amounts of retroactive benefits are thereby accruing at the rate of 47% of $1197 per month from the November 8, 1989, Court of Appeals opinion until such time as it becomes finally effective and is served on the Secretary.

on these past benefits, for which he was given no credit by the Court of Appeals.

III. The Oregon statute and its application in this case violate both the Oregon and U.S. Constitutions.

There were serious constitutional law questions which were raised by the husband at the trial court. (Husband's Trial Memorandum, pages 5-8). The trial court refused to rule the law unconstitutional, but since the husband prevailed on the merits at the trial court, a cross appeal was not required.

As argued below Oregon Laws 1987, chapter 188, is unconstitutional to the extent that impairs previous contracts. The husband and wife came to an agreed settlement of their original dissolution action, in which the wife agreed to give up any claim for spousal support. This related directly to the pension at the time

because the husband was already receiving the pension then, and using it as the major source of his income. Achieving a settlement of the dissolution action with the wife whereby she gave up her claim for spousal support allowed the husband to arrange his future financial plans and obligations with the assurance that he would continue to receive his pension until he died. Therefore, this decision results in an unconstitutional impairment of the husband's right to contract.

U.S. Const. art I, §10 provides in part that no state shall pass any "Law impairing the Obligation of Contracts." Or. Const. art I, § 21 provides, in relevant part, that "no * * * law impairing the obligation of contract shall ever be passed." *Thornsen v. Builders Board*, 21 Or. App. 148, 153, 533 P.2d 1388 (1975) holds that this constitutional language

means just what it says. In this case the parties had reached an out of court agreement and in effect signed a contract. The contract vested certain rights. The husband arrived at this contract as any other person would contract, and the Legislature does not constitutionally have the right to impair that contract.

IV. Congress never intended that the Uniformed Services Former Spouses Protection Act be applied retroactively.

Further, nothing in the federal enabling law, 10 U.S.C. § 1408[8] (which authorized the passage of Oregon Laws 1987, chapter 188) makes any reference to the law being intended to be retroactive in application, as against judgments which were already final. Whether a statute operates retrospectively or prospectively only is

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[8] See Appendices 3 and 4.

determined solely by legislative intent. *Hassett v. Welch*, 303 U.S. 303 (1938). Courts have long employed a rule of strict construction against the retrospective operation of statutes. *See, e.g., United States v. The Peggy*, 5 U.S. 103, 110 (1801). The courts will conclude that legislative body intended a statute to operate retrospectively only where that intention is expressly stated, *Murray v. Gibson*, 56 U.S. 421, 434 (1853), or where the intent is "clearly, explicitly, positively, unequivocally, unmistakably, and unambiguously shown by necessary implication or by terms which permit no other meaning to be annexed to them, and which preclude all question in regard thereto, and leave no reasonable doubt thereof." 73 Am. Jur. 2d, Statutes, § 350, p. 487. This rule of construction is particularly applicable where, as here, retrospective appli-

cation would impair a vested right. *Id.*

This issue of retroactive application of the federal statute has not been resolved uniformly among the several states. Oregon obviously believed it had the authority to apply the statute retroactively. California has come to a similar conclusion, although it held that such retroactivity must be enacted by a state legislature since the federal statute, standing alone, did not permit such retroactive application. *In re Marriage of Potter*, 179 Cal. App. 3d 73, 224 Cal. Rptr. 312 (1986).

Louisiana, on the other hand, has held that retroactive application would violate the clear intent of Congress. *Stevens v. Stevens*, 476 So. 2d 883 (La. App. 1985).

The federal statute contains no express language that it be applied retrospectively to final judgments or decrees under *McCarty v. McCarty*, 453 U.S. 210

(1981), or to final judgments at all. It cannot be speculated that Congress had more than pending cases in mind when it selected the language it chose, as it did omit any reference to the statute's retrospective operation or to final judgments. Since *McCarty* was a determination by this Court, it is the supreme law of this land for non-disability military pension awards finalized between June 26, 1981, and February 1, 1983. This Court's characterization of those pensions as the service members' separate property is controlling. Oregon law, which purports to allow those final decrees to be reopened for a different determination, must yield to the supremacy clause of the United States Constitution:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the

> Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

U.S. Const., art. VI, § 2. *See also Maryland v. Louisiana*, 451 U.S. 725, 746-47 (1981) and *McCulloch v. Maryland*, 17 U.S. 316 (1819).

V. Conclusion.

The application of the special Oregon statute to require division of military pension benefits already received by the Petitioner violates the federal law upon which the Oregon statute was based. Further, in this case the application of the Oregon statute impairs the obligation of a contract and thus violates both the U.S. and Oregon Constitutions. Finally, Congress did not intend that the Uniformed Services Former Spouses Protection Act should be applied retroactively at all (i.e., to dissolution decrees which were

already final). State court holdings on this issue are in conflict, and that conflict should be resolved by this court.

Respectfully submitted,

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August 20, 1990

APPENDIX

1. U.S. Const., art. VI, § 2

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

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2. Oregon Laws 1987, chapter 188, § 1.

(1) A decree of marital annulment, dissolution or separation that became final on or after June 25, 1981, and before February 1, 1983, may be modified to include a division of military retirement benefits payable on or after February 1, 1983. The decree shall be modified in a manner consistent with federal law and the

laws of this state as they have existed since February 1, 1983.

(2) Modification of a decree under this section may be granted whether or not the decree expressly reserved the pension issue for further determination, omitted any reference to a military pension or assumed in any manner that military pension benefits were not, as of the date on which the decree became final, divisible marital property.

(3) Any proceeding to modify a decree of marital annulment, dissolution or separation under this section shall be commenced before January 1, 1989.

(4) This section shall remain in effect only until January 1, 1989.

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3. 10 U.S.C. § 1408(c) (1987)

(1) Subject to the limitation of this section, a court may treat disposable

retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

(2) Notwithstanding any other provision of law, this section does not create any right, title or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may not treat the disposal retired or retainer pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the

member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

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4. 10 U.S.C. § 1408(d) (1987)

(1) After effective service on the Secretary concerned of a court order providing for the payment of child support or alimony, or, with respect to a division of property, specifically providing for the payment of an amount of the disposable retired or retainer pay from a member to the spouse or a former spouse of the member, the Secretary shall make payments (subject to the limitations of this section) from the disposable retired or retainer pay of the member to the spouse or former spouse in an amount sufficient to

satisfy the amount of child support and alimony set forth in the court order and, with respect to a division of property, in the amount of disposable retired or retainer pay specifically provided for in the court order. In the case of a member entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date of effective service. In the case of a member not entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to retired or retainer pay.

(2) If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the

member performed at least 10 years of service creditable in determining the member's eligibility for retired or retainer pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired or retainer pay of the member as property of the member or property of the member and his spouse.

(3) Payments under this section shall not be made more frequently than once each month, and the Secretary concerned shall not be required to vary normal pay and disbursement cycles for retired or retainer pay in order to comply with a court order.

(4) Payments from the disposable retired or retainer pay of a member pursuant to this section shall terminate in accordance with the terms of the applicable court order, but not later than the date of

the death of the member or the date of the death of the spouse or former spouse to whom payments are being made, whichever occurs first.

(5) If a court order described in paragraph (1) provides for a division of property (including a division of community property) in addition to an amount of child support or alimony or the payment of an amount of disposable retired or retainer pay as the result of the court's treatment of such pay under subsection (c) as property of the member and his spouse, the Secretary concerned shall pay (subject to the limitations of this section) from the disposable retired or retainer pay of the member to the spouse or former spouse of the member, any part of the amount payable to the spouse or former spouse under the division of property upon effective service of a final court order of garnishment of

such amount from such retired or retainer pay.

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5. June 14, 1989, Opinion of the Court of Appeals of the State of Oregon

In the Matter of the Marriage of

ROSALIE GAIL VALLEY, Appellant,

and

ROBERT CLIFFORD VALLEY, Respondent.

No. CA A49529.

Appeal from Circuit Court, Clatsop County. Thomas E. Edison, Judge. Argued and submitted March 17, 1989.

BUTTLER, P.J.

Wife seeks to have the dissolution judgment modified pursuant to Oregon Laws 1987, chapter 188, to include a division of husband's Coast Guard pension. The trial court denied her petition.

Husband entered the Coast Guard in April, 1961. The parties were married July

21, 1962. Husband retired on January 1, 1982, and the marriage was dissolved on September 15, 1982. During the marriage, the parties were transferred frequently across the United States; as a result, they never acquired a home. Under the original judgment, wife received no spousal support and, by husband's estimate, received approximately $8,000 in assets. The parties agree that the settlement was a "pretty even" division of their assets excluding husband's pension, which has a present value exceeding $100,000.

In 1982, courts were precluded from dividing a military pension or taking into account its value in making a property division incident to a divorce. McCarty v. McCarty, 453 US 210, 101 S Ct 2728, 69 L Ed 2d 589 (1981); Vinson and Vinson, 57 Or App 355, 644 P2d 635 (1982). On February 1, 1983, the Uniformed Services Former Spouses

Protection Act (10 USC § 1401 et seq) went into effect, and effectively overruled McCarty. State courts may now divide military pensions. In 1987, the Oregon legislature enacted Oregon Laws 1987, chapter 188, section 1:

> "(1) A decree of marital annulment, dissolution or separation that became final on or after June 25, 1981, and before February 1, 1983, may be modified to include a division of military retirement benefits payable on or after February 1, 1983. The decree shall be modified in a manner consistent with federal law and the laws of this state as they have existed since February 1, 1983.
>
> "(2) Modification of a decree under this section may be granted whether or not the decree expressly reserved the pension issue for further determination, omitted any reference to a military pension or assumed in any manner that military pension benefits were not, as of the date on which the decree became final, divisible marital property.
>
> "(3) Any proceeding to modify a decree of marital annulment, dissolution or separation under this section shall be commenced before January 1, 1989.
>
> "(4) This section shall remain in effect only until January 1, 1989."

The trial court refused to award wife part of husband's pension benefits, because it believed that doing so would constitute an award of permanent spousal support. Husband admits that this case falls within the statute but argues that the trial court acted within its discretion, because the statute is permissive: that is, the judgment "may be modified." (Emphasis supplied.) However, we review de novo.

In any event, the trial court erred as a matter of law when it treated division of the pension as spousal support. Retirement benefits are marital property, Barter and Barter, 65 Or App 416, 671 P2d 1188 (1983), and are subject to division as property, which division may not normally be modified. [Footnote 1: A special statute expressly authorizes the kind of modification involved here during a limited time period.] Spousal support is subject to

modification. the value of husband's pension clearly was not taken into account when the property was divided in the dissolution judgment. Wife was married to husband for nearly all of his time in the Coast Guard, during which 94 percent of his pension accrued. We perceive no reason why wife should not receive one-half of that marital asset accumulated during the marriage.

Reversed and remanded for entry of judgment modifying dissolution judgment to award wife 47 percent of husband's Coast Guard pension and entry of a Qualified Domestic Relations Order pursuant to IRC § 414(p). Costs to wife.

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6. November 8, 1989, Opinion of the Court of Appeals

In the Matter of the Marriage of

ROSALIE GAIL VALLEY, Appellant,

and

ROBERT CLIFFORD VALLEY, Respondent.

No. CA A49529.

Appeal from Circuit Court, Clatsop County. Thomas E. Edison, Judge.

On respondent's petition for reconsideration filed September 13, 1989. Former opinion filed June 14, 1989, 97 Or App 95, 775 P2d 332 (1989).

BUTTLER, P.J.

Husband seeks reconsideration of our opinion in this case 97 Or App 95, 775 P2d 332 (1989), where we held that wife is entitled to 47 percent of husband's Coast Guard pension. We treat the petition as one for reconsideration, ORAP 10.10, allow reconsideration and modify the disposition in our former opinion to read:

> "Reversed and remanded for entry of judgment modifying dissolution judgment to award wife 47 percent of husband's Coast Guard pension beginning with benefits payable on or after

February 8, 1988, and entry of a Qualified Domestic Relations Order pursuant to IRC § 414(p). Costs to wife.

Petition for reconsideration allowed; former opinion modified; adhered to as modified.

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7. February 9, 1990, Order of Oregon Court of Appeals Denying Reconsideration

IN THE COURT OF APPEALS

OF THE STATE OF OREGON

In the Matter of the Marriage of

ROSALIE GAIL VALLEY, Appellant,

and

ROBERT CLIFFORD VALLEY, Respondent.

ORDER DENYING RECONSIDERATION

The Court of Appeals has considered the Petition for Review filed in this case as a Petition for Reconsideration and has, on FEBRUARY 09, 1990, denied the petition. ORAP 9.15. The Supreme Court may now proceed to determine whether to grant

review. The appellate court decision is not enforceable until the Supreme Court has completed its review of the petition. ORAP 14.05.

GEORGE M. JOSEPH, CHIEF JUDGE

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8. March 27, 1990, Order of Oregon Supreme Court Denying Review

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Marriage of

ROSALIE GAIL VALLEY, Appellant,

and

ROBERT CLIFFORD VALLEY, Respondent.

ORDER DENYING REVIEW

The Court has considered the petition for review and ORDERS that it be denied.

DATE: MARCH 27, 1990

EDWIN J. PETERSON, CHIEF JUSTICE

Van Hoomissen, J., not participating.

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9. May 22, 1990, Order of Oregon Supreme Court Denying Reconsideration

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Marriage of

ROSALIE GAIL VALLEY, Appellant,

and

ROBERT CLIFFORD VALLEY, Respondent.

ORDER DENYING RECONSIDERATION

The Court has considered the petition for reconsideration and ORDERS that it be denied.

DATED: May 22, 1990.

Edwin J. Peterson, Chief Justice